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In The

Supreme Court of the United States

October Term, 1992

THE BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

v.

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Third Appellate District, Court Of Appeal For The State Of California

BRIEF OF THE COUNTIES OF SANTA CRUZ, SANTA CLARA, RIVERSIDE, LAKE, SISKIYOU, YUBA, GLENN, DEL NORTE, PLUMAS, SIERRA, MARIPOSA MONO, HUMBOLDT, MADERA, SOLANO, SAN BENITO, SHASTA, AND NEVADA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Amici Curiae submit this brief as political subdivisions of the State of California in support of the Respondents.

INTEREST OF AMICI CURIAE

Amici Curiae SANTA CRUZ COUNTY, SANTA CLARA COUNTY, RIVERSIDE COUNTY, LAKE COUNTY, SISKIYOU COUNTY, YUBA COUNTY, GLENN COUNTY, DEL NORTE COUNTY, PLUMAS COUNTY, SIERRA COUNTY, MARIPOSA COUNTY, MONO COUNTY, HUMBOLDT COUNTY, MADERA COUNTY, SOLANO COUNTY, SAN BENITO COUNTY, SHASTA COUNTY, AND NEVADA COUNTY are counties and political subdivisions of the State of California.[1]

Each of the amici curiae has a direct and substantial interest in the validity of the legislation challenged by the petitioners. All of the amici curiae contract with the California Public Employees Retirement System ("PERS") to provide various levels of retirement benefits to their employees as specified in contracts between amici and the Board of Administration of PERS. The legislation challenged by the petitioners authorizes each of the amici to receive a credit against their obligation to make current contributions to the PERS fund from surplus monies

[1] Under Article XI, Section 1 of the California Constitution, counties are recognized as legal subdivisions of the State of California. The parties joining in this amicus curiae are designated counties under State law. California Government Code Section 23012.

which had been accumulated in the PERS fund. In accordance with the express intent of the legislation, this savings has been and is being used to avoid layoffs of public employees by amici which would otherwise be required if these surplus funds are not available as an offset against the current contribution obligations of amici to the PERS fund.[2]

INTRODUCTION

It is submitted that the petition filed herein does not present important questions of federal law to be settled by the U.S. Supreme Court, nor does the State Court decision in this case decide a federal question in conflict with another state's highest court or of a federal Court of Appeals.

BACKGROUND FACTS

Each of the amici provides retirement benefits to its employees through the Public Employees Retirement System as authorized by contracts between their boards of supervisors and the Board of Administration of PERS. In accordance with the provisions of California Government Code Section 20457, the PERS contracts, including the retirement plan of benefits, are negotiated with and approved by the employees of each contracting agency.

[2] The savings to counties from the legislation is in excess of $143,000,000, as shown on an information sheet distributed by PERS, a copy of which is attached as Exhibit "A".

The Public Employees Retirement Law provides a base annual cost-of-living increase in retiree benefits of two percent pursuant to the provisions of Section 21224 of the California Government Code. In addition, each contracting agency had been authorized at their option to contract for a higher cost-of-living adjustment of retiree benefits, i.e., three percent, four percent or five percent by Section 21230 of the Government Code. Beginning in 1984, the State Legislature authorized the use of "excess" earnings on employee contributions to fund supplemental cost-of-living retiree benefit programs ("Boatwright", "IDDA", and "EPDA" programs). These supplemental cost-of-living benefits granted by the Legislature were extra-contractual, were not permanently funded, and the authorizing legislation expressly stated that these benefits may only be available for a limited period of time and/or contingent on the availability of funds. The legislation in question, Assembly Bill 702 adopted by the State Legislature on June 28, 1991, and signed by the Governor on June 30, 1991 as an urgency measure, repealed the IDDA and EPDA programs, provided for a credit of the surplus funds in IDDA and EPDA accounts against the future employer contribution obligations of participating public agencies, provided for the contracting of PERS actuaries by the Governor subject to the consent of the State Legislature, and directed the establishment of a new permanently funded cost-of-living benefit program for all retiree members of PERS.

The nature of the funding of PERS is central to any consideration of this case. Whereas the petitioners state that the prior supplemental cost-of-living benefit programs (Boatwright, IDDA, and EPDA) were funded by

"excess earnings on employee contributions" and that the PERS trust funds are to be used for the exclusive purpose of providing benefits, petitioners have failed to recognize that the contributions of employees and the earnings thereon are part of the funding of the benefits which the public employers have agreed to provide to their employees. As noted in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478, fn. 5, the PERS plan is a defined benefit plan. Under PERS, both the employer and the employee are required to make contributions based on a percentage of "compensation", but whereas the employee's contribution rate is fixed, the employer's rate is adjusted annually after periodic actuarial analysis to provide the additional funds required to pay the defined benefits. *Id.* at 1479. The California Court of Appeal's decision in this case recognized that "ordinarily such earnings [on employee contributions] are accumulated to meet the basic pension obligations of the State and other PERS employers." 4 Cal.App.4th 646, 652. "Excess" earnings on employee contributions which should have been devoted to the payment of the benefits at the levels defined by the contracts of public employers (and thereby reduce the employer contribution rates) were instead diverted to pay for the Boatwright, IDDA, and EPDA supplemental cost-of-living benefits which local public employers did not contract to pay.[3] The legislation at issue allows public

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[3] An employer providing a pension program also has contractual rights not to have its pension obligations increased. *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978).

employers to receive a credit against their current contribution obligations which appropriately offsets prior overcharges paid by the public employers.

ARGUMENT

POINT I

THE CALIFORNIA COURT HAS NOT DETERMINED THAT THE BOATWRIGHT, IDDA, AND EPDA SUPPLEMENTAL COST-OF-LIVING PROGRAMS CREATED ANY CONTRACTUAL RIGHT, AND THE LEGISLATIVE INTENT AND CIRCUMSTANCES INDICATE THAT NO CONTRACTUAL RIGHTS WERE CREATED.

In their petition, petitioners have failed to state the constitutional test for determining whether there is an impairment of the obligation of contracts within the meaning of Article I, Section 10 of the U.S. Constitution. As this Court has recently stated in *General Motors Corp. v. Romein*, 503 U.S. ___, 117 L.Ed.2d 328, 112 S.Ct. 1105 (1992), with regard to whether there is an impairment of obligation of contract under Article I, Section 10 of the Constitution:

> "This inquiry has three components: Whether there is a contractual relationship, whether a change in law impairs that contractual relationship and whether the impairment is substantial."

It is further stated by this Court in *Energy Reserves v. Kansas Power and Light*, 459 U.S. 400, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983):

> "The threshold inquiry is 'whether the State law has, in fact, operated as a substantial impairment of a contractual relationship' (citations). The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected (citations) . . . on the other hand, State regulation that restricts a party to gains reasonably expected from the contract does not necessarily constitute a substantial impairment." 459 U.S. at 411; 74 L.Ed.2d at 580.
>
> . . .
>
> "It is only if the State regulation constitutes a substantial impairment does the Court reach the issue of whether the State in justification had a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." 459 U.S. at 411-412; 74 L.Ed.2d at 581.

It is further stated by this Court in *General Motors Corp. v. Romein, supra,* 117 L.Ed.2d at 337:

> "We 'accord respectful consideration and great weight to the views of the State's highest court', but ultimately we are 'bound to decide for ourselves whether a contract was made'."[4]

It is undisputed that under California law employees generally acquire a contractual right to pensions, i.e.,

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[4] Although petitioners quote the clause referring to the duty of the Court to independently determine whether there is a constitutional impairment of contract, they omit the first part of the Court's statement that the Court is to "accord respectful consideration and great weight to the views of the State's highest court". *Indiana, ex rel. Anderson v. Brand,* 303 U.S. 95, 100 (1938).

Olson v. Cory (1980) 27 Cal.3d 532, 540; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863. However, the question addressed in this case is not whether an employee has a contractual right to a public pension, but whether employees acquired contractual rights in the particular supplemental cost-of-living benefits which were granted by the State Legislature on an extra-contractual basis to members of PERS and on the express basis that those benefits were temporary and/or subject to the availability of funds.

The California Court of Appeal's decision in this case assumed for the purposes of its opinion that the legislation providing for the supplemental cost-of-living benefits (IDDA and EPDA benefits) established contractual rights. However, the Court expressly did not rule on that issue. 4 Cal.App.4th at 660 and 665. Without deciding the threshold issue, the Court of Appeal moved to the issue as to whether the legislation abolishing the prior supplemental cost-of-living benefit programs and allowing the credit of the surplus funds against employer contributions, and the replacement of that program with a permanently funded cost-of-living program provided a comparable benefit so as not to result in a substantial impairment of contractual rights. The Court of Appeal concluded that the new COLA program provided an obvious new advantage in that it granted "actual benefits for the theoretical but illusory higher benefits under the repealed programs." *Id.* at page 660. The Court concluded that "no contract rights are impaired". *Id.* at page 652.

The legislative intent and the legislative language and circumstances surrounding the adoption of the supplemental cost-of-living benefits are pivotal in determining whether a contractual right has been created. As stated in *U.S. Trust v. New Jersey* 431 U.S. 1, 17, fn. 14 (1977):

> "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."

In *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railroad Company* 470 U.S. 451 (1985), this Court rejected a challenge to a federal law under the contracts clause because "neither the language of the statute nor the circumstances surrounding its passage manifests any intent on the part of Congress to bind itself contractually. . . . " *Id.* at 470. The Court further noted that there is a presumption against contractual rights being created in State laws and it is the burden of the challenger to overcome that presumption. *Id.* at 465-466.

A contractual right is also dependent on "reasonable expectations and consideration", *Energy Reserves v. Kansas Power and Light*, 459 U.S. 411, 74 L.Ed.2d 569, 580 (1983), and "legitimate expectations", *General Motors Corp. v. Romein*, 117 L.Ed.2d 328, 340 (1992). Similarly, under California law contractual rights under a pension plan depend on reasonable pension expectations. Cf. *Olson v. Cory* (1980) 27 Cal.3d 532, 540; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.

As noted by the decision of the Court of Appeal in this case, the legislation expressly stated that the IDDA benefits "may be available for only a limited period of time and that the Board may discontinue the increases", and also noted that the EPDA benefits were also provided on the basis that they "may be available only as a result of extraordinary returns to the system". 4 Cal.App.4th at 657.

The legislation for the so-called "Boatwright benefit", Section 21236 of the Government Code, required the following special notice to recipients:

> "The Board shall inform each recipient of benefits . . . that the increases are not cumulative and shall not be included in their base allowance and may be available for only a limited time."

With regard to the IDDA benefits, Government Code Section 21235 required the following special notice to recipients:

> "The Board shall inform each recipient of benefits . . . that the increases are not cumulative, not part of the base retirement allowance, and may be available for only a limited period of time, and that the Board may discontinue the increases."

With regard to the EPDA benefit, Government Code Section 21238 required the following special notice to recipients:

> "The Board shall inform each recipient of benefits . . . that the payments are not cumulative, not part of the base retirement allowance, and may be available only as a result of extraordinary investment returns to the system."

It would seem apparent from this statutory language and the circumstances surrounding its adoption that the intent of the Legislature was *not* to make these benefits part of the contractual pension rights of public employees but it was to grant an extra-contractual benefit to retirees which could be discontinued or replaced.

POINT II

THE CONTRACTUAL RIGHTS RECOGNIZED BY THE CALIFORNIA COURTS OF PUBLIC EMPLOYEES IN GOVERNMENT RETIREMENT PROGRAMS ARE NOT IMPAIRED BY REASONABLE MODIFICATIONS.

The California courts have only recognized the acquisition by public employees of limited contractual rights in retirement programs subject to the ability of the public agency to make reasonable modifications which provide comparable benefits. As stated by the California Supreme Court in *Betts v. Board of Administration, supra,* at 863-864:

> "A long line of California decisions has settled the principles applicable to the problems herein presented. A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance to employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity (citation). The employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a "substantial or reasonable pension" (citation).
>
> . . .

> "However, there is a strict limitation on the conditions which may modify the pension system in effect during employment. We have described the applicable principles as follows: 'An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system (citations). Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages (citations) . . . '."

Accordingly, if the modification of a California government retirement program meets the reasonable comparability test developed by the California courts, then there has been no impairment of any contractual rights recognized under California law.

As indicated hereinabove, the California Court of Appeal determined that the permanently funded, new supplemental cost-of-living benefit program provided a comparable benefit to the theoretical but illusory higher benefits under the repealed programs, and therefore no contract rights were impaired. The Court of Appeal's application of the established principles of California law pertaining to the modification of government retirement programs is entitled to great weight.

POINT III

EVEN IF IT IS ASSUMED THAT CONTRACTUAL RIGHTS WERE CREATED BY THE SUPPLEMENTAL COST-OF-LIVING BENEFIT PROGRAMS, AND THAT THE NEW LEGISLATION CONSTITUTED A SUBSTANTIAL IMPAIRMENT OF THOSE CONTRACTUAL RIGHTS, THE MODIFICATION WOULD STILL BE JUSTIFIED ON THE GROUNDS IT SERVED A SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE.

Under the U.S. Supreme Court decisions, the Court only reaches the issue of whether there was a significant and legitimate public purpose to support a regulation *if* the State regulation is determined to constitute a substantial impairment of contract. *Energy Reserves v. Kansas Power and Light, supra,* at 459 U.S. 411-12. Even assuming contractual rights are created, and that those rights are substantially impaired by legislation, the remedying of a broad and general social or economic problem may constitute a significant and legitimate public purpose justifying a substantial impairment of contract. *Energy Reserves v. Kansas Power and Light, supra* at 411-412. Petitioners repeatedly contend in their petition that the legislative action was "solely in order to save itself money" (Page 11), for the "express purpose of saving an employer money" (Page 14), and that "[I]ndeed if this money had simply been given to charity, employees would have been no worse off" (Page 22). These statements incredibly ignore the express purpose of the urgency legislation and the fiscal realities present in California which is in the midst of a deep recession. Section 42 of Chapter 83 of the 1991 Statutes stated:

> "In expending any savings which accrue to Public Employees Retirement System employers as a result of the repeal of the retirement allowance adjustment programs established pursuant to Sections 21235, 21236, 21237 and 21238 of the Government Code, the state, school districts, cities, counties, local districts, agencies, and any other public employees retirement system employers, shall give the highest priority to retaining or rehiring as many as possible of those Public Employees Retirement System members subject to layoff or reduction."

If anyone should recognize the reality of this statement, it should be the unions and associations which are petitioners in this action. Many of their members have already been laid off due to the fiscal crisis and any unavailability of the almost $2 billion at stake in this litigation to the State, counties, school districts and other public agencies contracting with PERS would result in a further layoff of substantial numbers of their members. The purpose of avoiding further layoffs of employee members of PERS by counties, cities and special districts throughout the State during this recession addresses the broad and general social and economic problems created by the recession, and it is a remedy which is directly related to the retirement system. Employees laid off who have not yet become vested in PERS would lose any rights to receive any benefits under either the supplemental cost-of-living benefit programs or under the basic retirement programs. Furthermore, even employees vested in PERS who are laid off prior to retirement age would possibly face the unpleasant choice of either "cashing out" their retirement contributions and thereby forfeiting all their retirement rights or trying to survive

without a paycheck while they seek other employment during a recession. It is extremely doubtful that any such employees would view "charity" as being an acceptable alternative to the loss of their jobs.

POINT IV

THE FACT THAT THE VARIOUS STATES USE DIFFERENT STANDARDS FOR DETERMINING WHETHER THERE HAS BEEN AN IMPAIRMENT OF CONTRACT IN THE MODIFICATION OF GOVERNMENT PENSIONS DOES NOT INDICATE A NEED FOR INTERVENTION BY THIS COURT.

Petitioners argue that this case raises issues of general importance and that it is necessary that this Court resolve the "confusion" and conflicts among State Courts on when government pensions can be modified.

This Court has long held that whether government pension programs are subject to modification (or abolition) is dependent on State law. *Dodge, et al. v. Board of Education of the City of Chicago, et al.*, 302 U.S. 74, 82 L.Ed. 57, 58 S.Ct. 98 (1937). Accordingly, the nature of the contractual rights, if any, of public employees in government pensions are to be determined state by state under their respective laws. In addition, this Court will accord respectful consideration and great weight to the determination of the State's highest courts on whether contractual rights have been created. *Indiana, ex rel. Anderson v. Brand, supra,* and *General Motors Corp. v. Romein, supra.* As noted hereinabove, under California law, public employees only acquire limited contractual rights in a government retirement, subject to the ability of the public agency to modify the pension program so as to provide

comparable benefits. Moreover, the supplemental cost-of-living benefits at issue in this litigation are unique in that they were extra-contractual, expressly limited in time and/or contingent on the availability of funds, and recipients were specifically advised these benefits were uncertain and not part of their base retirement allowance.[5]

Indeed, as discussed hereinabove, there has been no determination by the California courts that these unusual supplemental cost-of-living benefit pension programs even created any contractual rights.[6] Accordingly, this

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[5] The decision of the Court of Appeal in this case is also consistent with the recent decision of the Court of Appeal in *Walsh v. Board of Administration of the Public Employees' Retirement System* (1992) 4 Cal.App.4th 682 (Petition for Review denied by the California Supreme Court on June 11, 1992, and a Petition for Writ of Certiorari rejected by the U.S. Supreme Court on November 9, 1992.) In that case, the Court of Appeal found that a member of the State Legislature did not have any contractual rights to an extraordinary benefit granted during a time when the Legislature's retirement system was not an actuarially based pension, there was no continuous appropriation for the payment of those benefits, and the Legislature had the reserved power to limit benefits. Similarly, in this case the Boatwright, IDDA, and EPDA benefits were not part of the actuarially based retirement plan, there was no permanent funding for the payment of those benefits, and the authorizing legislation expressly stated that the benefits may be available for only a limited period of time and/or were contingent on availability of funds.

[6] The additional issue raised by petitioners regarding the legality of the transfer of the authority to hire actuaries from the PERS Board of Administration to the Governor has become moot for the reason that a statewide initiative (Proposition 162) was approved by the voters on November 3, 1992, restoring this authority to the PERS Board.

case does not present any issue ripe for determination by the Court, nor is the unusual nature of the programs at issue herein likely to be replicated in other states so as to warrant review of the determinations of the State Court of Appeal. It is neither necessary nor appropriate in light of the long-standing judicial precedent to attempt to resolve the various positions of the states with regard to modification of government pensions.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari does not raise substantial questions of federal law which need to be settled by this Court, nor does the decision of the State Court conflict with any of the prior decisions of this Court or of other States' highest courts or of any federal Court of Appeal.

Dated: November 18, 1992

Respectfully submitted,
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EXHIBIT A

County	Credit
Alpine	$167,847
Amador	1,023,421
Butte	3,516,265
Calaveras	853,109
Colusa	842,458
Del Norte	658,800
El Dorado	3,332,192
Glenn	962,374
Humboldt	4,251,610
Inyo	1,062,152
Kings	2,934,920
Lake	1,495,585
Lassen	776,705
Madera	1,883,748
Mariposa	497,415
Modoc	496,088
Mono	831,897
Monterey	9,467,840
Napa	3,380,990
Nevada	1,763,885
Placer	4,405,442
Plumas	917,815
Riverside	22,858,533
San Benito	701,603
Santa Clara	44,710,957
Santa Cruz	6,346,651
Shasta	3,886,567
Sierra	260,841
Siskiyou	1,790,165
Solano	6,444,657
Sutter	1,955,896
Tehama	1,511,694
Trinity	40,437
Tuolumne	1,541,816
Yolo	3,962,303
Yuba	1,563,474
Total	$143,098,152